No. 2805

In The

United States

Circuit Court of Appeals

For the Ninth Circuit

MICHAEL GEORGE,

Plaintiff in Error

VS.

MRS. GEORGE MYERS,

Defendant in Error

Reply Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

GUNNISON & ROBERTSON

Attorneys for Plaintiff in Error

BEATTIE, PRINTER, JUNEAU

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REPLY OF PLAINTIFF IN ERROR

The keynote of plaintiff's brief is that the judgment should be sustained because she did not recover on the rent account, which is set up in her second cause of action, and to which plaintiff asserts the third, fourth, ninth and nineteenth errors related. As proof of this plaintiff refers to the affidavit of jurymen.

(P. R. p. 161)

Without this affidavit it must be admitted that there is nothing in the record to indicate whether plaintiff recovered on one particular cause of action or on both.

In Glaspell vs. North Pacific R. Co., 43 Fed. 900 at 909, the Court said:

> "Upon the grounds of public policy, the Courts have almost universally agreed upon a rule that no affidavit, deposition, or sworn statement of a juror shall be received to impeach the verdict or to *explain it, or show on what grounds it was rendered.*"

See also McDonald vs. Pless, 206 Fed. (4th C. C. A.) 263, at 265, which lays down the same doctrine.

It therefore follows that plaintiff's entire theory, viz: that no error was committed as she did not recover on the rent account, falls flat, there being no competent evidence in the record to disclose the fact upon which plaintiff bases her major premise.

Before passing it occurs to us to point out that plaintiff's criticism of the printed record is not warranted as the record itself shows that her counsel placed his "O. K." upon and approved the bill of exceptions before the order allowing it was made by the trial court.

(P. R. p. 165)

We submit that such being the fact it is too late to question the record and that such approval constitutes an agreement that the bill of exceptions is correct.

Ry. Co. vs. Jackson, 64 Fed. 79 (8th C. C. A.)

The Third Error: Plaintiff contends in her brief that defendant's third assignment of error is based upon false premises. This contention is based upon the fact that the defendant, after the exclusion of the question:

"How much did you pay your husband, Mrs. Meyers, for this account that he has got against Mike George?" (P. R. p. 36), asked the further question:

"Was the assignment in writing, Mrs. Meyers?" (P. R. p. 36).

It is very apparent from the record that the trial court of its own volition excluded the latter question because the trial court thought that the witness did not know what the word "assignment" meant. However, the witness should have been permitted to state for herself whether or not she knew the meaning of the word; and in view of the fact that she had previously answered, without it being explained to her, the question put by her counsel:

"Did Mr. Meyers *assign* this account over to you to put in this case?" (Plaintiff's Brief, page 11), in which the verb form of the word "assignment" was used, it is fair to

assume that she did know the meaning of the word.

Plaintiff evidently places great weight on the decision laid down in Haviland vs. Johnson, 139 Pac. 720. However, in that case Judge Bean simply held that an assignment of a claim for the purpose of collection is based upon a valuable consideration, and therefore evidence of the former was competent under an allegation of the latter. There is nothing to indicate that the court in that case did or would not permit cross-examination as to the assignment. Plaintiff contends in her brief that she testified that her husband assigned the account to her for the purpose of collection. (Plaintiff's brief p. 10.) We submit that there is no such testimony in the case. The stipulation set up in her brief does not disclose any such evidence nor can the words "to put in this case" under any definition laid down by any lexicographer be given the meaning "for the purpose of collection in this suit". However, even if the plaintiff had in her testimony used the identical words "for the purpose of collection in this suit", we submit that this would not cure the error of which the defendant complains, which is that he was deprived of his right to cross examine the plaintiff on one of the material matters set up in her complaint which it was necessary for her to plead and prove.

Calloway vs. Oro Mining Company, 89 Pac. 1070

Ninth Error: We desire simply to call attention to the fact that this witness had previously testified that the entries in the book were in his hand writing (P. R. p. 38, 53); and the plaintiff herself had testified that the book was in his handwriting (P. R. p. 31).

In conclusion we respectfully submit that errors were

committed in material matters in the proceedings in the case to the substantial prejudice of defendant, and that there is nothing either in the printed record or in the brief of plaintiff which demonstrates that those errors did not and could not have prejudiced the rights of the defendant. This being true, we again urge that the rule should be followed which is laid down by the Supreme Court of the United States in Vicksburg & Meridian Railroad vs. O'Brien wherein the court at 119 United States, page 103, said:

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party."

We therefore earnestly pray that the judgment of the trial court be reversed.

Respectfully submitted,

GUNNISON & ROBERTSON

Attorneys for plaintiff in error